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No. 80-1121

In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH J. CLARK, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY BRIEF FOR THE UNITED STATES

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1. Respondents assert (Br. 11-14) that the two-step rule of Section 5334(b) necessarily applies here because the GS positions they obtained had been advertised as "merit promotions." This assertion is founded on the false assumption that "promotions" from WS positions to GS positions are equivalent to promotions within the GS system. As explained in our opening brief (at 20-21), an employee "promoted" to a higher grade within the GS system, by the express terms of the statute, assumes greater duties and responsibilities *by definition*. See 5 U.S.C. 5102(a)(5); see also 5 U.S.C. 5101(1)(B), 5104. When employees are "promoted" to the GS system from lower paying positions in the wholly separate WS system, there is no comparable inherent increase in responsibility.

As explained in our opening brief (at 13-15), a "promotion" from a non-GS system to the GS system is defined in the Civil Service regulation on which the Court of Claims relied, 5 C.F.R. 531.202(h)(2), in terms of whether the

employee receives an increase in pay. The fact that a vacancy is filled through "merit promotion" procedures does not necessarily signify that the employee selected for the position is assuming a more responsible position, nor does it even guarantee that the employee selected will receive a salary increase and, thus, ultimately be classified as having been "promoted."[1] Moreover, to make the applicability of Section 5334(b) depend upon whether the employee receives a "promotion" under 5 C.F.R. 531.202(h)(2) would turn the analysis on its head by requiring *reference* to the final rate of pay in order to *determine* the final rate of pay. Here, for example, the characterization of respondents' personnel actions as a promotion, which forms the basis for the Court of Claims' holding, is solely a consequence of the Navy's discretionary application of the "highest previous rate" rule to provide an increase in pay. By contrast, a promotion within the GS system is defined as a change from one GS grade to a higher GS grade, 5 C.F.R. 531.202(h)(1) (see Gov't Br. 14 n.11); because it does not depend on the new rate of pay, this provision can be used as a benchmark to determine the applicability of Section 5334(b).

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[1]For example, in May 1973, the Navy could have advertised a GS-5 position under merit promotion procedures. The person appointed to that position could receive an annual salary between $7,694 (GS-5, step 1) and $10,007 (GS-5, step 10). If the position were filled by a blue-collar worker receiving pay in grade WG-10, step 1, whether that transfer would be classed as a "promotion" would depend on where the blue-collar worker had been employed. If he had been employed in the Columbus, Georgia Wage Area, his salary would have been $8,008 ($3.85/hour), and he could have been promoted to a GS-5, step 3, at $8,208. If he had been employed in the Detroit, Michigan Wage Area, however, his old salary would have been $11,502 ($5.53/hour), and he would have had to take a pay cut, or "demotion," to GS-5, step 10, at $10,007.

The availability of a two-step pay increase thus does not depend on whether the new position is obtained by "merit" or whether it qualifies as a "promotion" under 5 C.F.R. 531.202(h)(2).[2] Indeed, as respondents recognize in the WS context (Br. 19-20 n.18), the legislative history clearly establishes Congress' intent that the minimum salary increase attending some "promotions" be governed not by Section 5334(b), but by Commission regulations. See H.R. Rep. No. 1264, 81st Cong., 1st Sess. 12 (1949); Gov't Br. 13 & n.10. Rather, Congress manifestly intended to make the increase available only to promotions or transfers within the GS system.[3] The focus of the provision is exclusively on General Schedule employees; the subchapter containing Section 5334 is entitled "General Schedule Pay Rates," and it expressly excludes blue-collar workers from its coverage. 5 U.S.C. (Supp. III) 5331(b) and 5 U.S.C. 5102(c)(7). Indeed, when Section 5334(b) was first enacted in 1949, the only reference in the civil service statute to the prevailing rate salary system was a provision *excluding* blue-collar

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[2]Respondents suggest (Br. 13-14 & n.13) that they are entitled to a two-step increase because, apart from any administrative definition, the positions that they obtained in the GS system were positions of greater responsibility than their previous positions, *i.e.*, "promotions." However, the applicability of Section 5334(b) does not turn on this question. If it did, the courts would have to decide the applicability of the two-step pay increase by comparing, in each individual case, the relative responsibilities of the old and new positions. Congress could not possibly have intended to impose this burden on the courts.

[3]Amicus curiae AFL-CIO erroneously suggests (Am. Br. 13) that the government conceded in the Court of Claims that employees who move from the GS system to the WS system, or who are promoted within the WS system, receive a two-step increase. As was explained in detail in our opening brief (at 15-16 n.13), the government has always maintained that such employees do not receive a two-step increase; the statute expressly excludes them from the coverage of Section 5334(b) (see 5 U.S.C. (Supp. III) 5331(b) and 5 U.S.C. 5102(c)(7)), and their salary is determined by Commission regulations.

workers from its coverage and stating that their compensation should be fixed (administratively) "in accordance with prevailing rates." 5 U.S.C. (1952 ed.) 1082(7). Moreover, the language of Section 5334(b) cannot be reconciled with respondents' contention that it applies to WS employees who transfer to GS positions. As explained in our opening brief (at 12), Section 5334(b) applies only to employees promoted from one "grade," defined in 5 U.S.C. 5102(a)(5) as a range of pay *in the General Schedule*, to a higher grade.[4]

2. Amicus curiae AFL-CIO asserts (Br. 4-5) that the provision in Section 5334(b) concerning an employee receiving "basic pay at a rate saved to him under subchapter VI" demonstrates the statute's applicability to WS employees when they are transferred into the GS system. Subchapter VI, 5 U.S.C. (Supp. III) 5361-5366, provides for salary retention for certain employees who are reduced in grade for reasons unrelated to their job performance. Section 5334(b) protects such a GS employee against the possibility that his salary, which exceeds the normal salary for his grade level, will be reduced despite the statutory two-step increase when he is promoted to a higher GS grade. It specifies the employee's salary as the higher of his retained basic pay or his salary as computed under the Section 5334(b) formula.

The fact that Subchapter VI provides retained basic pay for WS employees, in addition to GS employees, casts no doubt on the conclusion that Section 5334(b) applies only to promotions within the GS system. On the contrary, the history of this provision provides further evidence that

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[4]Ignoring the statutory definitions, respondents point out (Br. 15) that the term "grade" is also used in Subchapter IV to describe the classification levels in the WS system. However, this usage of the term "grade" in the statute originated in 1972, long after Section 5334(b) was enacted in 1949.

Congress intended that Section 5334(b) apply only to promotions within the GS system. Prior to the enactment of Subchapter VI in 1978 (Pub. L. No. 95-454, 92 Stat. 1218), the civil service pay statute provided for retained basic pay in two different sections. Section 5337 provided for salary retention for GS employees, and Section 5345, enacted in 1972, provided for salary retention for WS employees. Significantly, the provision of Section 5334(b) protecting this retained basic pay applied only to GS employees; it protected "an employee so promoted or transferred [who] is receiving basic pay at a rate saved to him under *section 5337* of this title * * *." 5 U.S.C. 5334(b) (emphasis added). Thus, this provision demonstrates Congress' understanding that Section 5334(b) does not apply to employees transferring from the WS system to the GS system.

3. Respondents assert (Br. 21-26) that the administrative construction of Section 5334(b) has not been consistent and therefore is entitled to no deference. Respondents apparently rely for this proposition (Br. 23 n.20) on the fact that there have been some changes in the language of the applicable regulation since 1950. Respondents do not contest, however, that the relevant agency regulations and interpretations have always provided that Section 5334(b) applies only to promotions within the General Schedule. See Gov't Br. 23-25. Neither irrelevant changes in the language of the regulation nor the fact that an administrative error was made at first in computing respondents' salaries (Resp. Br. 26) diminishes the force of this longstanding official agency interpretation.

For the foregoing reasons and the reasons set forth in the government's opening brief, the judgment of the Court of Claims should be reversed.

Respectfully submitted.

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